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(1935) 09 PAT CK 0012

In the Patna High Court

Mahabir Prasad Marwari — APPELLANT

Vs

Syed Shah Mohammad Yehia and Another — RESPONDENT

Date of Decision : 23-09-1935

Acts Referred:

Citation : (1935) 09 PAT CK 0012

Hon'ble Judges : Courtney-Terrell, C.J;Varma, J

Bench : Full Bench

Judgement

Courtney-Terrell, C.J.—The following are the reasons for our order dated 7th August 1935, dismissing this appeal with costs. This is an appeal by the plaintiff, who is a merchant, shopkeeper and money lender, from the dismissal of his suit to recover from defendant 2 (a trustee) a sum of Rs. 14,000 in respect of money lent and goods supplied to defendant 1 the trustee-predecessor of defendant 2 on the allegation that the money lent and the goods supplied were lent and supplied for the benefit of the trust and were so in fact applied by defendant 1. It is now admitted that the money and goods were in fact supplied to defendant 1 and a judgment has been given against defendant 1, but defendant 2 and the trust property have been held free from liability. It was contended that in fact the money and goods supplied to defendant 1 were applied by him to the services of the trust. It was held that the plaintiff had failed to establish this. Now where a trustee has incurred debt the creditor cannot recover against the trust property unless the trustee, if he had paid the debt, could have claimed indemnity out of the trust property. In other words the principle of subrogation applies; the creditor can only claim to stand in the shoes of the trustee as against the trust property and his rights are no greater than those of the trustee. This is the law in India as well as in England.

2. The right of a trustee to be indemnified out of the trust property for expenses incurred by him is a matter of the particular trust concerned and of the rules applicable to a trust of the class to which it belongs. In this case the trust is of the class known as "wakf" and of the variety founded for the perpetuation of

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religious establishment based on the personality of some deceased saint. In this kind of wakf the duty of the mutawalli extends to the performances of religious observance and he is also the religious superior of the establishment. Such a mutawalli Is called a sajjadanashin.

Sajjada is the carpet on which prayers are offered and nashin is the person seated thereon. The sajjadanashin is not only a mutawalli but also a spiritual preceptor. He is the curator of the dargah where his ancestor lies buried, and in him is supposed to continue the spiritual line (silsila). These dargahs are the tombs of celebrated dervishes, who, in their lifetime, were regarded as saints: see Ameer Ali''s Mahomedan Law, 4th Edn., Vol. I, p. 443.

3. There is no dispute that the trust is of this character. Defendant 1 at the date of the transactions in question was the sajjadanashin of this trust or kankah. Subsequently to the transactions with the plaintiff he was, on petition, removed from the office of mutawalli by order of the District Judge on account of extravagance and mismanagement of the trust funds. He was allowed to continue in the purely religious capacity of sajjadanashin of the kankah, but defendant 2 was appointed mutawalli and assumed the temporal functions of the trusteeship and the control of the trust property. We have now to consider the position of a mutawalli in the matter of his power to bind the trust funds to pay debts incurred by him. The fact that in this case the mutawalli is a sajjadanashin is of little if any, importance. Having regard to the nature and object of the trust to perpetuate the memory of a particular saint, the sajjadanashin can only be chosen from among the saint''s descendants and ho is under an obligation, in addition to his duties as mutawalli (i.e., managing the trust property and out of it any allowance reserved by the trust deed to specified persons or classes of persons) to carry out religious ceremonial. But in the matter of the trust funds he is in no better position than that of any other mutawalli. In this capacity he may borrow money and incur debts for the preservation of the trust property, but even then only with the sanction of the Kazi (whose modern representative is the District Judge) and the Kazi may authorize him to create an incumbrance upon the waqf property. If the income from the property should decline he must cut down the payments to beneficiaries. He may not pay dividends out of capital and in no case may he mortgage the capital to pay off loans) without the consent of the Kazi. The learned authorities cited by Mr. Ameer Ali at pp. 470 and 471 of the work referred to establish this limitation upon the power of the mutwalli, and the history and nature of this particular waqf is fully described in the judgment of this Court reported in Md. Kazim v. Abi Saghir 1932 Pat 33. In the matter of the limitation upon his powers he is in a position other than that of a Mahanth of a Hindu math who appears to have the power of pledging the credit of the math not merely to preserve it from loss or destruction but for the carrying on of the daily ordinary objects for which the math was founded.

4. Under the trust deed, the duty of the sajjada-nashin in his capacity as mutwalli was to collect the revenues of the property, to distribute therefrom the

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allowances to certain descendants or as they have been termed in the course of this case, "co-sharers" who were collateral descendants of the family to which the saint belonged, to pay for the religious observances and the salaries of the drummers who are employed on ceremonial occasions and out-of the surplus, if any, to maintain himself and his family. It would appear that about the time of the transactions when the debts were incurred there was some difficulty in collecting the rents of the property on account of the litigation which was going on with a view to the removal of the sajjada-nashin. It is said that it was on this account that the sajjada-nashin was obliged to borrow the money. The revenues which were actually collected were insufficient to pay the allowances and salaries contemplated by the trust and were insufficient to leave an adequate balance to provide for the sajjada-nashins family. The collections were also insufficient to pay Government revenues and the moneys borrowed, in particular the specific loan of Rs. 5,000, were borrowed for the purpose of discharging these obligations. It is further said that the plaintiff lent the money and supplied the goods to defendant 1 in his capacity as sajjada-nashin and not to him as an individual. If this were a material factor, and in my opinion it is not, it might be material to decide whether the credit was given to the trust fund or to the borrower personally and further to decide whether the money and goods actually supplied by the plaintiff were in fact applied to the benefit of the trust fund. The attention of the learned Subordinate Judge was not directed to the real point of the case and he thought that these other questions were material: even so he decided in fact against the plaintiff on both of these issues and in any case, in my opinion, his finding of fact was correct.

5. It is true that the plaintiff must have been well aware that defendant 1 derived such income as he had wholly from the trust estate and it is true that in the plaintiff''s books defendant 1 is described by his religious title, but this is only by way of identification of the defendant as an individual. There is no evidence at all that credit was given to the trust fund in the sense that it might have been given to the agent of a disclosed principal. I see no reason whatever to doubt the bona fides of the plaintiff. He lent money to a person whom he thought was in a position to repay and without any thought of taking advantage of the extravagance of the borrower to the detriment of the trust fund. The sympathy of the Court must be with him, but this is no reason why injustice should be done to defendant 2 or the fund of which he is a trustee. The plaintiff has certainly shown that almost immediately after the borrowing of the money the land revenues and other expenses which should fall upon the trust fund were in fact discharged, but this is quite consistent with the borrower having by his extravagance and mismanagement, failed to discharge these obligations notwithstanding adequate resources and having been driven to borrow for those purposes. It does not follow that there was in fact a necessity for the borrowing. A part of the indebtedness is due to goods supplied, and it is said that these were for the necessities of persons of the class for whose relief the trust fund was established and also for the necessities of the sajjada-nashin''s own family

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whose support was one of the objects of the trust fund. But there is no evidence that either the money or the goods were necessary for the purpose of saving the trust property from extinction. They were, as admitted by Mr. Das in his able argument on behalf of the plaintiff, required for the carrying out of the ordinary objects for which the trust was founded. This may well be so, but as I have said, the carrying out of the objects of the trust is not a purpose for which a mutwalli may bind the waqf property though it may be that a Mahanth of a Hindu math might have this power. Moreover in no case was the consent of the Kazi or the District Judge obtained for the purpose. It has been argued that there is no reason why the creditor of a Mahanth should be in a position better than that of the creditor of a sajjada-nashin. But it should be realised that although in so far as the creditors of all kinds of trustees are concerned, they stand in the same position by virtue of the doctrine of subrogation, nevertheless the trustees of two kinds of trusts into whose shoes the respective creditors are called have widely different powers with respect to the trust fund. The two principles are clearly enunciated by the judgment in the leading case of Sailendra Nath Palit v. Hade Kaza Mane 1932 Cal 856 the learned Judges say:

The analogy contended for on behalf of the plaintiff, in our judgment, is neither supported by precedent nor founded on principle, and is by no means perfect. As a general rule of Hindu law property dedicated to religious uses is inalienable, but the shebait or mohunt may in a, case of need or for the benefit of the institution, sell or mortgage debutter property or grant a permanent lease thereof. A mutwalli on the other hand has no power, without the permission of the Court, to mortgage, sell or exchange wakf property, unless he is expressly authorised by the deed of wakf to do so; and his power to grant leases is much more restricted, so that he may not grant leases for more than three years, in case of agricultural lands or for more than a year in the case of non-agricultural lands unless he is expressly authorised to do so by the deed of wakf or unless he has obtained the leave of the Court for the purpose- To introduce the doctrine of protection of a bona fide lender would be to infringe upon these limitations of the mutwalli''s powers. Where an executor borrows money in his capacity as executor (the will of the testator not expressly authorizing him to do so) without creating a charge on the property and the estate under his management is enriched or benefitted by the money so borrowed, the right that the creditor may claim as against the estate is a right to be indemnified out of the estate to the necessary extent and unless the right of the executor to the indemnity is established the creditor has none against the estate.

6. Even if these differences between the position of a mutwalli and a Mahanth had not existed and they do not seem to have been indicated to the learned Subordinate Judge, I agree with his findings that the plaintiff has failed to establish that the borrowings and the goods were in fact applied to the objects of the waqf or that there was "necessity" in any sense, for the incurring of the debts. For these reasons the appeal is dismissed with costs.

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Varma, J.

7. I agree. There was one other point with which I should like to deal. Mr. G.P. Das urged that the appellant was seriously prejudiced in the trial of the case inasmuch as certain account books alleged to be in possession of the receiver were not produced in spite of the request of the appellant. It appears that on 12th August 1931 a petition was filed by the plaintiff for the production of a jamakharach bahi. On the next date for hearing, viz., 16th September 1931, another petition was filed for the production of certain papers by the receiver. On 21st December 1931 the Court ordered certain papers to be filed according to the plaintiff''s petition and affidavit filed on that date; but the papers do not seem to have been filed. The case was actually taken up for hearing on 13th June 1932, and the judgment was delivered on 8th August 1932. No steps seem to have been taken under Order 11, Rule 21, Civil P.C. It seems that the plaintiff, after filing the petitions mentioned above, did not press the matter any further, nor did he seek the assistance of the Court in getting those documents produced. Therefore this point also fails.

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